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MICHAEL RODAK, JR., CLERK

No. 76-566

In the Supreme Court of the United States

OCTOBER TERM, 1976

HARRY D. IACONETTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 17a-26a) is reported at 540 F. 2d 574. The opinion of the district court (Pet. App. 6a-16a) is reported at 406 F. Supp. 554.

**JURISDICTION**

The judgment of the court of appeals was entered on August 4, 1976, and a petition for rehearing was denied on September 22, 1976. The petition for a writ of certiorari was filed on October 22, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**QUESTIONS PRESENTED**

1. Whether the district court erred in admitting certain rebuttal testimony into evidence.
2. Whether the district court erred in submitting the counts charging petitioner with bribery and extortion to the jury.

3. Whether petitioner's Fourth Amendment rights were violated by the admission into evidence of tape recordings that were made with the consent of a party to the conversations.

#### STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on three counts of soliciting and accepting a bribe, in violation of 18 U.S.C. 201(c).<sup>1</sup> He was sentenced to a concurrent term of four years' imprisonment on each count. The court of appeals affirmed (Pet. App. 17a-26a).

1. The facts adduced at trial are contained in the opinions of the district court (Pet. App. 7a-9a) and the court of appeals (Pet. App. 18a-20a). Insofar as relevant to the petition, they show that in February 1975 petitioner, a Quality Assurance Specialist employed by the General Services Administration (G.S.A), was assigned to conduct a pre-award survey of the Champion Envelope Manufacturing Company to ascertain whether the company was capable of performing a contract upon which it had successfully bid. On February 10, 1975, petitioner met with Michael Lioi, president of the company, and suggested that if Lioi were willing to pay him one percent of the contract price he would assure favorable treatment for the company by G.S.A. Lioi informed petitioner that he would have to discuss the matter with his business partners, Zenon Babiuk and Alan Goldman. That same day Lioi conferred with his partners and their attorney, Morris Stern; he thereafter contacted the

<sup>1</sup>Petitioner also was found guilty on two counts of extortion, in violation of 18 U.S.C. 1951, but the district court dismissed those counts prior to sentencing.

Federal Bureau of Investigation and was advised to record any subsequent conversations with petitioner. On February 11, using his own tape recorder, and on February 24, using a tape recorder supplied by the F.B.I., Lioi recorded conversations with petitioner during which the two men made arrangements for payment of the requested bribe. On February 24, 1975, Lioi met with petitioner as previously arranged and gave him the money. Petitioner was then arrested by F.B.I. agents who had observed the transaction (Pet. App. 19a).

2. At trial, Lioi related the circumstances of his meetings with petitioner and described the negotiations for and the details of the bribe solicitation. To corroborate this testimony, the tapes of the February 11 and February 24 conversations between Lioi and petitioner were introduced into evidence. In an attempt to discredit Lioi's testimony, petitioner testified that it was Lioi who had suggested the bribe. Under cross-examination, however, petitioner admitted that after his arrest he had told F.B.I. agents an entirely different story, namely, that the whole episode with Lioi had been a practical joke (Pet. App. 20a). To rebut petitioner's claims, the government then called Stern and Goldman, who testified that, at their meeting with Lioi on February 10, 1975, Lioi had reported petitioner's bribe offer to them (Pet. App. 8a-9a).

Following his conviction, petitioner moved for a new trial on the ground that the testimony of Stern and Goldman was inadmissible hearsay. The district court denied the motion, holding that the testimony was either not hearsay because introduced to rebut a charge of recent fabrication (Fed. R. Evid. 801(d)(1)(B)) or, if hearsay, was admissible under a number of exceptions to the hearsay rule (Pet. App. 11a-16a). The court of appeals affirmed. It reasoned that "by demanding the bribe [petitioner]

necessarily authorized the persons who ran the business to discuss his demand among themselves" (Pet. App. 21a). Accordingly, the court concluded that the testimony of Goldman, Lioi's business partner, concerning what Lioi had told him about his conversation with petitioner on February 10, was properly admitted under Rule 801(d) (2)(C) of the Federal Rules of Evidence, which provides that "[a] statement is not hearsay if \* \* \* [it] is offered against a party and is [made] by a person authorized by [that party] to make a statement concerning the subject [involved]" (see Pet. App. 21a). Stern's rebuttal testimony, the court held, also was properly admitted under Rule 803(24), the residual hearsay exception, since the testimony "possessed sufficient indicia of reliability," was "the best evidence available to corroborate Lioi's account of the February 10 meeting," was "relevant to a material proposition of fact," and "served to clarify what actually was said and intended by both Lioi and [petitioner] at that meeting" (Pet. App. 22a).

#### ARGUMENT.

1. Petitioner's principal claim (Pet. 8-13) is that the rebuttal testimony of Goldman and Stern was inadmissible hearsay. This contention is fully answered by the opinions of the court of appeals and the district court, on which we rely. Contrary to petitioner's assertions (Pet. 12), the trial judge did not usurp the province of the jury in determining that petitioner impliedly authorized Lioi to discuss the bribe with his partners, since questions of admissibility of evidence are for the court, even if factual determinations are involved. Similarly, there is no merit to petitioner's claim (Pet. 12-13) that he failed to receive adequate notice under Rule 803(24) that the government intended to offer the rebuttal testimony of Goldman and Stern. While it is true that petitioner was not notified prior to trial,

the need for the testimony did not become apparent until after petitioner had contradicted Lioi's version of the February 10 meeting. The court of appeals correctly concluded that, in these circumstances, some latitude must be permitted under the notice provisions of the rule (Pet. App. 22a). Accord, *United States v. Carlson*, C.A. 8, No. 76-1363, decided December 17, 1976, slip op. 11-12. This is especially true since petitioner was not prejudiced by the lack of notice. Although petitioner was informed of the government's intention to offer the rebuttal testimony three days in advance of its introduction, he never requested a continuance or claimed at any time that he was unprepared to meet the testimony (Pet. App. 22a).

Finally, although petitioner concedes the relevance of the rebuttal testimony, he contends that "its unfair prejudice cannot be discounted" (Pet. 11). However, the trial judge carefully weighed any possible prejudicial effect of the testimony against its conceded probative value and correctly concluded (Pet. App. 10a-11a):

The prejudicial effect of the evidence was not significant. The jury had already heard that the [petitioner] had solicited a bribe on February 10th. The emotional impact of hearing two brief confirmations of the solicitation was negligible. Furthermore, since the rebuttal testimony was restricted, by direction of the court, to repetition of the [petitioner's] statements to Mr. Lioi, as related by Mr. Lioi to the witnesses, there was no confusion, delay, or waste of time.

2. Petitioner contends (Pet. 14) that he was prejudiced by the district court's submission of the counts charging extortion and bribery to the jury. Although petitioner asserts, without elaboration, that the multiple charges were "confusing [and] misleading," they were properly

joined in the indictment and, as the court of appeals correctly held (Pet. App. 23a), "there was enough evidence of both crimes to submit both of them to the jury." Any prejudice to petitioner was eliminated by the district court's dismissal of the extortion counts prior to sentencing.

3. Petitioner's final contention (Pet. 15-16) that the tape recordings of his conversations with Lioi were improperly admitted into evidence is frivolous, since the tapes were made with the knowledge and consent of Lioi. See *United States v. White*, 401 U.S. 745; 18 U.S.C. 2511 (2)(c) and (d).

#### CONCLUSION

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

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